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No. E87-0018(L)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

EVERDEAN MOORE, WIFE OF AMOS MOORE, DECEASED, AND BOBBIE AMIKER, JOSEPH MOORE, CLINTON AMOS MOORE, ANNIE M. COLLINS, ALMA McGOWAN, VASHTI CLAYTON, ELLA MAE CURRY, WILMA H. BLANCH, DeLOIS THOMPSON, AND AARON MOORE, CHILDREN OF AMOS MOORE, DECEASED

Petitioners,

vs.

KELLER INDUSTRIES OF ALABAMA,
A Florida Corporation

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I.

REASONS FOR NOT GRANTING THE PETITION FOR WRIT OF CERTIORARI

Contrary to the Petitioners' assertions, should this Petition for Writ of Certiorari be granted, the Court would not be presented with the question of whether the Fifth Amendment, or the Court's decision in ***Batson v. Kentucky***, 476 U.S. 79 (1986), applies in cases between purely civil litigants in federal court. Rather the Court would be presented with the same issue presented on appeal to the Fifth Circuit; whether the district court abused its discretion in overruling the Petitioners' ***Batson*** objections.

The Petitioners argue that the issue presented is identical to that already before the Court in ***Edmondson v. Leesville Concrete Co., Inc.***, No. 89-7743, ____ U.S _____, 112 L.Ed. 2d 18 (October 1, 1990).

Edmondson, however, is easily distinguished. There, the district court denied the plaintiffs' request that the defendant articulate a neutral explanation for its peremptory challenges on the grounds that the *Batson* decision did not apply to civil proceedings. *Edmondson*, 895 F.2d 218, 219 (5th Cir. 1990). Similarly, in *Fludd v. Dykes*, 863 F.2d 822, 824 (11th Cir. 1989) and *Dunham v. Franks Nursery & Crafts, Inc.*, 919 F.2d 1281, 1282 (7th Cir. 1990), the district court and magistrate, refused to require any explanation for the use of the peremptory challenges at issue on the grounds that *Batson* did not apply in civil cases.

Unlike those cases, the district court in this case, following the Fifth Circuit panel decision in *Edmondson*, 860 F.2d 1308 (5th Cir. 1988), applied *Batson*, and ordered Keller to articulate its reasons

for peremptorily challenging the two black jurors.

Even if *Batson* does apply to cases between civil litigants, the constitutional safeguards set forth in *Batson* were afforded to the Petitioners, and Keller ultimately prevailed after two jury trials in district court and an appeal with oral argument to the Fifth Circuit by the Petitioners. The Petitioners actually are requesting the Court not to determine the applicability of certain constitutional safeguards in a civil case, but to conduct a *de novo* review of the district court's ruling on their *Batson* objections. This is manifest from the space they have devoted in their Petition to Keller's reasons for exercising its peremptory challenges. Keller does not intend by its Response to lend any credence whatsoever to the Petitioner's assertion that this case is appropriate for review on Certiorari.

However, the Petitioner's extensive discussion of Keller's peremptory challenges, cast in a light most favorable to Petitioners, mandates a clarifying response. In that regard, the transcript of the relevant portion of the record in the second trial is attached hereto as Appendix "A".

When questioned by the district court, Keller's counsel stated that the first black juror, Mr. Rackley, was struck because of his advanced age which Keller believed might indicate bias in favor of the Petitioners due to the age of the deceased. Appendix "A" at V. In addition, Mr. Rackley had a deceased parent which Keller believed might indicate bias in favor of the Petitioners. *Id.* Finally, Mr. Rackley was struck because on ***voir dire*** he was observed to be "nonresponsive in terms of contemplating questions from both the plaintiffs' and the defendant's counsel".

Id. Contrary to the Petitioners' assertions, Mr. Rackley was not struck merely because he did not respond to the questions. Rather he was struck because it appeared that he did not understand the questions or was not attempting to consider the questions asked on ***voir dire***. A juror's inability or unwillingness to pay attention to questions asked on ***voir dire*** is not a subjective or non case-specific reason for striking a juror.

The second black juror, Mrs. Mildred Bonner, also was struck for a number of reasons. First, she had a parent, friend, or spouse who had apparently suffered death from trauma. *Id.* at VI. That fact indicated to Keller's counsel that she might be biased in favor of the Petitioners because it was their theory that the deceased's death was caused by trauma-induced stroke. Second, Mrs. Bonner indicated that she had some medical

knowledge that may or may not have been advantageous to Keller. *Id.* In that regard, Mrs. Bonner had at one time been a nurses' aide approximately ten years before the date of the trial. The Petitioners correctly note that Virginia Walker, a white licensed practical nurse ("LPN"), and Frances Rogers, a white hospital dietician, were seated as trial jurors.

The Petitioners failed to point out, however, that Ms. Walker was an LPN and had formal medical training. Ms. Walker also worked as an emergency room nurse and was familiar with trauma cases. Finally, and perhaps most significantly, Ms. Walker had worked with Dr. Austin Boggan, the deceased's physician who was an expert medical witness for Keller at trial.

Similarly, Ms. Rogers was a dietician with formal training and as such would not be assumed to have medical knowledge potentially harmful to Keller. In fact she

presumably would have knowledge concerning the health problems of elderly patients suffering from diabetes and high blood pressure, which is consistent with Keller's theory that the deceased's stroke was caused by those preexisting conditions.

Finally, Mrs. Bonner indicated that her son had been involved in an auto accident. Although there was some confusion as to the status of the ensuing litigation, at one point Mrs. Bonner stated that her son may have been injured and had a personal injury claim. *Id.* Rather than take a chance on Mrs. Bonner, Keller used one of its peremptory challenges to remove her from the jury.

Keller used its third peremptory challenge to exclude Theresa Fanning, a white juror. Two black jurors were eventually seated on the trial jury. If Keller intended to remove jurors based upon race it would not have used its remaining

peremptory challenge to exclude a white juror.

After hearing Keller's reasons, the district court, which had an opportunity to observe the jurors and hear their responses on *voir dire*, found that the strikes were not based on race and that the reasons given were legitimate. *Id.* at VIII-IX. The court went even further, however, and stated that "a sufficient articulation of reasons has been given for challenging these three jurors for cause." *Id.* at VII (emphasis added).

The Petitioners erroneously assert that the Fifth Circuit made no attempt to review the district court's ruling that there was no discrimination in Keller's use of its peremptory challenges. The Petitioners assume that the Fifth Circuit applied its *en banc* decision in ***Edmondson*** retroactively and therefore failed to consider their appeal on the ***Batson*** issue.

It is clear from the Fifth Circuit's opinion however, that the district court's *Batson* ruling was reviewed on appeal.

In pertinent part, the Fifth Circuit's opinion, attached as Appendix "A" to the Petition for Writ of Certiorari, states:

> After considering the briefs and oral arguments of counsel, in light of the relevant portions of the record of the two trials, and concluding that there was neither error nor abuse of discretion in the grant of the new trial or in any ruling relative to the new trial, and further finds that the jury verdict is supported adequately by the evidence....

Appendix A, Petition for Writ of Certiorari at II (emphasis added).

There were three issues presented on appeal to the Fifth Circuit. Keller's cross-appeal presented the question of whether the district court erred in granting the new trial following the first trial of the case. The Petitioners' appeal presented two issues: whether the district

court erred in overruling their ***Batson*** objection and whether the jury's verdict was against the great weight of the evidence. All three issues were addressed in the Fifth Circuit's opinion. The Fifth Circuit stated that there was "neither error nor abuse of discretion in [1] the grant of the new trial or [2] in any ruling relative to the new trial, and ... [3] that the jury verdict is supported adequately by the evidence." *Id.* Though not expressly stated, it is implicit from the structure and language of the opinion that "any ruling relative to the new trial" refers to the only remaining issue i.e. the ***Batson*** issue.

The Petitioners are dissatisfied with the result as they were following the defense verdict in the first trial and the $12,000 verdict in the second, and merely seek to review a decision of the Court of Appeals with which they likewise do not

agree. The Petitioners' main thrust is to complain about the brevity of the Fifth Circuit's opinion which they assume indicates no review of the district court's *Batson* ruling. It should be noted, however, that "[t]here is no requirement in law that a federal appellate court's decision be accompanied by a written opinion." *Furman v. United States*, 720 F.2d 263 (2nd Cir. 1983); nor is a federal appellate court compelled to spell out each and every issue reviewed and each and every reason for the court's decision. The Petitioners' complaints are fact specific and do not raise any issues of constitutional significance. They simply do not deserve certiorari review.

The Rules of the Supreme Court of the United States indicate the types of cases appropriate for review on writ of certiorari. Rule 10.1, *Rules of the Supreme Court of the United States*, provides that "[A] petition for a writ of

certiorari will be granted only when there are special and important reasons therefor." In the instant case the Fifth Circuit made no decision "in conflict with the decision of another United States court of [appeal] on the same matter." Rule 10.1(a), ***Rules of the Supreme Court of the United States***. Nor has the Fifth Circuit "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." *Id.* The decision of the Fifth Circuit herein does not fall within this language.

The Petitioners in the instant case are not asking this Court to consider the question of whether **Batson** applies to civil litigants exercising peremptory challenges in federal district court.

Unlike the lower courts in ***Edmondson, Dunham*** and ***Fludd***, the district court in this case applied ***Batson***; requested Keller

to state its reasons for its strikes and not only found that the reasons were legitimate and not discriminatory but that the reasons were sufficient to challenge the jurors for cause.

Therefore the Petitioners are actually requesting this Court to conduct a ***de novo*** review of the district court's factual findings with respect to Keller's reasons for exercising its peremptory challenges. The Fifth Circuit has already reviewed the district court's findings and a ***de novo*** review by this Court would not be appropriate on certiorari.

Even if this Court eventually holds that ***Batson*** applies in purely civil cases, the final result of that decision will be the same as that obtained in this case; the reasons for the strikes and the ruling of the district court will be reviewed by the Court of Appeals for error or abuse of discretion. That is precisely what occurred in the instant case.

CONCLUSION

In short, the district court applied *Batson*, and found no discriminatory motive. The Fifth Circuit reviewed the ruling of the district court for error or abuse of discretion and found neither. Therefore, there are no constitutional questions at issue and this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By _____
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APPENDIX "A": TRIAL TRANSCRIPT EXCERPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

EVERDEAN MOORE, WIFE OF
AMOS MOORE, DECEASED, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. E87-00018(L)

KELLER INDUSTRIES OF ALABAMA,
A Florida Corporation DEFENDANT

TRANSCRIPT OF TRIAL

VOLUME I

Trial held on May 15, 16 and 17, 1989, in Meridian, Mississippi, before the Honorable Tom S. Lee, United States District Judge, and a jury.

APPEARANCES:

For the Plaintiffs:

Mr. James Craig
Ms. Suzanne Ainsworth

For the Defendant:

Mr. John Holloman
Mr. Chris Hoyme

CAROL R. WINSTEAD
Official Court Reporter
245 E. Capitol, Room 518
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MR. CRAIG: Yes, sir. Plaintiffs' peremptory challenge number one would be juror number two, Thomas Doherty. Plaintiffs' peremptory number two would be number seven, Johnnie Wright; and number three would be number 14, Janie Moyer.

THE COURT: The panel is submitted now through number 20, Trevelle R. McGlothin.

MR. HOYME: Your Honor, we would move to strike number three, Mr. Rackley. We would then move to strike number eight, Mrs. Fanning, and then move to strike number 12, Mrs. Bonner.

THE COURT: All right, then. After the exercising of challenges the jury will consist of #4, Thomas S. Roundtree; #5, Brenda Kay Poe; #6, Mary E. Jones; #10, Virginia Walker; #11, Gus Goforth, Jr.; #13, Joe O. Chambers; #15, Edward M. Williamson; #18, James Jenkins; #20, Trevelle R. McGlothin; #22, Frances Rogers; #24, David H. Laney; and #25, Byron Craig Alexander.

MR. CRAIG: Judge, for the record, there's a case--I'm not sure you're familiar with it-- Batson v. Kentucky-- which has to deal with use

of peremptory challenges to strike all black persons. To my knowledge it has not been extended to civil cases, but I had a case on appeal where the Mississippi Supreme Court refused to apply Batson because it was not raised at this stage. I note for the record that all three of the persons struck by Chris by the peremptory challenges were black; and I think under Batson, were it to apply to a civil case, that he would be required to state nonracial reasons for his peremptory challenges.

THE COURT: I don't know the case, but there is a decision by a panel in the Fifth Circuit that has extended Batson to civil cases. I think that case has either gone en banc or is in the process of maybe that occurring.

MR. CRAIG: Well, then we raise it as a serious issue, Judge. I think he has done that.

MR. HOYME: I note for the record that Jim has struck only white jurors. I would ask that if the burden is placed on us to explain our

strikes here, that the burden also be placed on him to explain his. It's my understanding of the law that at this point Batson and that other case have not been formally applied to civil cases, and it's our position that it should not be; but for the record, we have not moved to strike any of these jurors simply on race.

MR. CRAIG: I'm prepared to make a response if the court wants me to.

THE COURT: There is a case that was decided within the last three or four months by the Fifth Circuit in a panel which, I think, included Judge Rubin, where the Fifth Circuit specifically applied the Batson rule to civil cases. I think that case is-- I'm not sure of this, but I believe that it's before the Fifth Circuit for en banc consideration. Taking that into consideration, the court will call on the defendant to explain the three challenges-- your peremptory challenges. And it may develop that that case is not the law, but as of now it is unless the en banc court overturns it.

MR. HOYME: Your Honor, among the criteria used by the defendant to strike juror three, Mr. Rackley, first, his age. He's fairly elderly, in his 50's, which we felt may prejudice him towards the plaintiff due to the age of the deceased. He also has or noted a deceased parent, which we felt would bias him somewhat towards the plaintiff. I also noticed him to be fairly nonresponsive in terms of contemplating questions from both the plaintiffs' and the defendant's counsel during voir dire. It's for those primary reasons that we moved to strike him.

The next juror stricken by the plaintiffs was Mrs. Fanning. She is juror number eight. To be honest, Your Honor, in looking at her, I'm not sure, for the record, whether she's black or white or whatever. I don't know. She is very light-complected; and Carol, right here, thought she was white. I'm not sure; and obviously, based on that observation, we didn't use race as a criteria to strike her. I found her to be very nonresponsive in terms of

contemplating questions by both plaintiffs' and defendant's counsel as well.

Finally, Your Honor, Mrs. Bonner, number 12, who's black. She had a number of responses regarding questions from Your Honor and Jim Craig. Apparently she had a parent-- a friend or a spouse who had suffered a death from trauma, which immediately raised a red flag for defense counsel which we think would prejudice her in plaintiffs' favor. She also appears to have some medical knowledge that may or may not be advantageous to the defendant, and I'm still not sure what the situation is with her son regarding the auto accident. I don't think it was clear; and because it wasn't clear, I didn't want to take a chance on her, and I thought there was a good possibility that she could be prejudiced in favor of the plaintiffs. And it's for those reasons that we moved to strike these people, and not in any manner did we move to strike these people based on race.

THE COURT: With reference to Mildred Bonner, I thought the first time that she said her son was injured and had a personal injury

claim. The second time it seemed that either he is being sued-- or what she referred to as her insurance policy and company is being sued, and I'm not sure either whether he was injured and, if so, whether he has a claim. But I make that observation.

MR. HOYME: The reason I didn't follow it up more specifically is that she started mentioning insurance a lot, and I just thought we should shut it down and go on. I still don't understand what the situation is with her son.

THE COURT: The court is of the opinion that a sufficient articulation of reasons has been given for challenging these three jurors for cause.

MR. CRAIG: Judge, may I make this brief statement in rebuttal? I realized Your Honor has ruled, but I also-- in the Batson case I have had before, they also faulted the moving party for not rebutting the justifications.

THE COURT: All right. Go ahead.

MR. CRAIG: That would simply be three things. One is that in the Batson line of

cases where there is an articulated justification, that applies equally well to white persons who are not struck. That's a rebuttal issue. And though Mr. Lackey is 50 o so years of age, Mr. Laney also appears to be elderly. There are several other persons who are at least in the 50 age range who are white and not struck. Five jurors responded to the question whether their parents had died, and s we feel that that was not a sufficient justification to base a strike on. And third, on the issue of jurors being nonresponsive, we think that's a red herring in that a juror being nonresponsive may just mean that none of the questions apply to them. That's not a sufficient justification for a peremptory challenge under Batson.

THE COURT: Well, there is a right to exercise peremptory challenges; and if the present case before the Fifth Circuit is applicable, that right is subject to the condition that the challenge not be made on account of race. The court is not satisfied

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that the strikes were exercised because of race. There were legitimate reasons given.

The court has received a response to the plaintiffs' motion in limine. The court has not received the motion in the limine itself.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari to James W. Craig, Esq., 123 E. Griffith Street, Jackson, Mississippi 39201; and Issac K. Byrd, Jr., Esq., Byrd & Associates, Post Office Box 19, Jackson, Mississippi 39205.

This the 11 day of April, 1991.

William N. Reed

William N. Reed

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